

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**ABM ONSITE SERVICES – WEST, INC.**

**and**

**CASE NO. 19-RC-144377**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
DISTRICT W24, AFL-CIO**

**POST-HEARING BRIEF  
ON BEHALF OF EMPLOYER**

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## **I. STATEMENT OF POSITION**

This matter arose out of a petition for representation filed by the International Association of Machinists and Aerospace Workers, District W24, AFL-CIO (the “Union”) on behalf of all regular full-time and part-time bag jammer technicians and dispatchers employed by ABM Onsite Services – West, Inc. (“ABM Onsite”) at the Portland International Airport (“PDX”), excluding leads, office and clerical employees, professional employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act (“NLRA”). Tr. 12:13-18.<sup>1</sup> ABM Onsite asserts that its employees and operations at PDX fall exclusively within the scope of the Railway Labor Act (“RLA”), not the NLRA. As a result, the underlying representation petition should be dismissed for lack of jurisdiction. Alternatively, ABM Onsite requests that the Regional Director refer the matter to the Board in Washington, D.C. so that the Board may seek an advisory opinion from the National Mediation Board (“NMB”) on the jurisdictional issue.

A two-part test is applied to determine whether an employer who does not fly aircraft for the transportation of freight or passengers is nonetheless a carrier subject to the RLA:

- (1) Is the nature of the work performed by the employees that which is traditionally performed by airline employees (the “function” test)?
- (2) Do RLA carriers own or control, directly or indirectly, the employer and its employees (the “control” test)?

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<sup>1</sup> References to the hearing record shall be as follows: ABM Onsite’s exhibits shall be cited as “ER Exh. \_\_\_\_”; the Union’s exhibits shall be cited as “Union Exh. \_\_\_\_”; Board Exhibits shall be cited as “Bd. Exh. \_\_\_\_” and references to the transcript shall be cited as “Tr. [page number]:[line number].”

*See, e.g. Aircraft Services Int'l, Inc.*, 352 NLRB 137, 139 (2008); *Evergreen Aviation Ground Logistics Enterprises, Inc.*, 327 NLRB 869, 869 n.1 (1999); *ServiceMaster Aviation Services*, 325 NLRB 786, 787 (1998).

In the vast majority of cases, the function test is not at issue, as it is clear that the work performed by the employees falls within the scope of work traditionally performed by airline employees. Such is the case here, as the work performed by the ABM Onsite employees is directly involved in getting passenger luggage from the airlines' ticket counters to their aircraft, which is work traditionally performed by employees of the airlines.

The control test focuses on the role that the carriers play in the company's daily operations and its effect on the manner in which the employees perform their jobs. *E.g., Quality Aircraft Services*, 24 NMB 286, 291 (1997). The following factors are often considered in determining whether sufficient carrier control exists:

- (1) Carrier control over the manner in which the entity conducts its business;
- (2) Carrier access to the company's operations and records;
- (3) The role carriers play in hiring, firing and disciplining the company's employees;
- (4) The degree to which carriers supervise the entity's employees;
- (5) The degree to which carriers otherwise affect conditions of employment;
- (6) Carrier control over employee training; and
- (7) Whether the employees are held out to the public as carrier employees.

*See Automobile Distribution of Buffalo Inc. and Complete Auto Network*, 37 NMB 372, 378 (2010); *Signature Flight Support of Nevada*, 30 NMB 392, 400 (2003).

It is not necessary for each of these factors to be present for the control test to be met and thus for a company to be found subject to the RLA. Indeed, in most – if not all – of the cases in which sufficient control has been found, at least some of these factors have not been present.

In *Kannon Service Enterprises Corp.*, 31 NMB 409 (2004), for example, the Board asked for the NMB’s view on whether employees performing services for Delta in Fort Lauderdale, Florida were subject to the RLA. The employees at issue performed similar types of functions as the ABM Onsite employees at PDX, specifically concerning the handling of passenger baggage. *Id.* at 410. The NMB found sufficient carrier control even though Kannon determined which employees worked each shift; its employees did not wear carrier uniforms; Delta did not directly supervise Kannon employees and did not meet with the line employees; and there was no evidence that Delta ever requested Kannon to discipline or remove an employee. *Id.* at 417. *See also PrimeFlight Aviation Services*, 34 NMB 175, 182-83 (2007) (finding carrier control even though employer hired its own employees and set their own wages and benefits where carriers reported problems with the employees and employer complied with carrier request to reassign an employee); *International Total Services*, 26 NMB 72, 76 (1998) (finding carrier control even though employer hired and fired its own employees where carriers “can request re-assignment and play a significant role in staffing and other working conditions”).

Here, the evidence of carrier control is even stronger than it was in *Kannon* as the airlines directly supervise ABM Onsite employees at PDX and have directed ABM Onsite to remove or reassign employees from their positions. Moreover, it is the carriers’ contractual right to exercise the indicia of control that is critical to the inquiry. Even if that right is exercised only occasionally, the fact that the carrier has such authority is critical in deciding whether the control test is met. *See, e.g., AVGR International Business, Inc.*, 27 NMB 232, 235 (2000) (company

subject to RLA even where carrier only occasionally trained and interacted with its employees); *Command Security Corp.*, 27 NMB 581, 585 (2000) (analyzing carrier control based solely on provisions in contracts with carriers); *ServiceMaster Aviation Services*, 24 NMB 186, 188-89 (1997) (citing carrier's authority to influence company's discharge decision, even though no one had been discharged, in finding company is subject to RLA); *Int'l Cargo Marketing Consultants, d/b/a Alliance Air*, 31 NMB 396, 407 (2004) (carrier's plan to require entity's employees to wear carrier's uniform, and entity's willingness to do so, cited as indicia of carrier control).

## **II. STATEMENT OF RELEVANT FACTS**

At PDX, ABM Onsite employees perform baggage handling services for the airlines through the Portland Airlines Consortium ("PAC"). Tr. 14:14-16; 15:20-23. PAC is a non-profit corporation that is comprised of all the airlines that operate out of PDX. Tr. 29:22-30:4; 223:18-23. PAC is designed to provide support services to the airlines at PDX and is governed by a committee comprised of representatives from each member airline. Tr. 29:22-30:4; 223:18-23. John Imlay is the General Manager for PAC. Tr. 15:24-16:1. Mr. Imlay's role is "to represent PAC in all matters relating to [ABM Onsite's] performance of the Services." ER Exh. 1, Section 3.02. As General Manager, Mr. Imlay has the explicit contractual authority to "manage, monitor, and coordinate the performance" of ABM Onsite's employees. *Id.* (emphasis added).

In 2010, PAC contracted out specific baggage handling services to a corporate predecessor of ABM Onsite, Linc Facility Services, LLC ("Linc"); that contract continues to govern the PAC-ABM Onsite relationship today. Tr. 32:7-13; 222:25-223:2; ER Exh. 1. PAC's contract with ABM Onsite covers, in general terms, the various services ABM Onsite provides to PAC at PDX. Tr. 34:3-6. ABM Onsite's arrangement with PAC at PDX is in the nature of a "cost plus" agreement, through which ABM Onsite is reimbursed for all of its costs incurred in

performing the services under the contract (subject to PAC approval), plus an additional percentage on top of its costs, which represents ABM Onsite's compensation or fee for its services. Tr. 82:23-24; 83:3-7; 226:1-4. Among the reimbursable costs are all of ABM Onsite's labor costs, which include, for each employee, the employee's compensation, unemployment insurance, health and welfare benefits, and taxes. Tr. 225:16-226:16; ER Exh. 4.

PDX is one of a small number of airports in the United States to implement a comprehensive Baggage Handling System ("BHS"). At PDX, the BHS is a five-mile long conveyor system that utilizes state-of-the-art technology to direct and monitor passenger checked baggage. The system utilizes high-powered scanning systems and Transportation Security Administration ("TSA") approved technology to streamline the baggage handling process and address security policies and procedures. Tr.19:22-20:6; 22:5-10; 24:4-10. There are several stations or posts along the system where ABM Onsite employees monitor and troubleshoot errors, jams, and outages, and from which they pick up and deliver luggage to the airlines. Tr. 55:18-21; 57:4-10; ER Exh. 2.

ABM Onsite currently employs 32 employees at PDX to provide these services to the airlines. Tr. 15:6-8. This figure includes 23 bag jammer technicians; four dispatchers; four supervisors; and one Facility Manager. *Id.* Bonnie Wagoner serves as the Facility Manager and is responsible for overseeing the management and operations of the BHS system and the associated ABM Onsite employees. Tr. 14:14-16. She takes direction from PAC, through constant communication with Mr. Imlay concerning the operations and staffing of the BHS. Tr. 30:5-6. Ms. Wagoner is in continuous contact with Mr. Imlay throughout the work day concerning a number of topics, including, among other things, the airlines' daily operational needs, changes to the airlines' schedules (and thus to the operations of the BHS and the

schedules of ABM Onsite employees), communication from airlines regarding changes to their operations or issues that arose regarding ABM Onsite's handling of baggage, decisions relating to the hiring of ABM Onsite employees, and disciplinary decisions. Tr. 30:19-25. Mr. Imlay dictated and set Ms. Wagoner's work schedule so that she works the same hours as Mr. Imlay. Tr. 31:1-2.

The BHS typically operates 20 hours per day, 7 days per week, although the hours of operation fluctuate depending on the schedule and needs of the airlines. Tr. 38:8-12. ABM Onsite employees are responsible for monitoring the system, clearing and resetting all baggage jams, security routing failures, minor faults, and other BHS operating faults. Tr. 18:8-11. ABM Onsite employees perform their work in or around the BHS, the airline make-up units (also known as bag wells), the baggage Control Room, the matrix and failsafe areas, the airline ticket counters, and the manual encode stations. Tr. 19:22-25; 23:9-12; 26:20-27:9; 46:4-16.

The Control Room serves as the organizational center for BHS. Tr. 36:16-23. The Control Room, which is staffed by ABM Onsite dispatchers, receives calls from the member airlines regarding baggage issues they may be experiencing. Tr. 35:14-21; 37:2-4. For example, a member airline will call the Control Room and ask the ABM Onsite dispatcher about the status of a particular baggage item. *Id.*; Tr. 248:5-23. At the airlines direction, ABM Onsite employees are then responsible for reviewing video footage and recorded data to identify the baggage item, retrieving the item, and delivering it to the airline, per the specific instructions provided by the airline. Tr. 36:16-23. The ABM Onsite dispatchers are the primary contact for all the airlines when it comes to baggage issues. Tr. 34:16-35:2, 35:14-21.

Bag jammer technicians are responsible for numerous functions associated with ensuring that passenger bags get from the airlines' ticket counters through the BHS and to the aircraft.



The specific functions that a jammer technician is responsible for performing at a given time depends on which of the various posts the jammer technician is stationed during a particular time period. There are six such posts, and each jammer technician rotates through all of those posts during a single shift. Tr. 37:7-12; 55:18-21; 56:12-57:10; ER Exh. 2. The PAC designated and established the posts that the jammer technicians staff. Tr. 37:7-12; ER Exh. 1, Exh. A.

One of the functions of jammer technicians is the clearing and resetting all baggage jams, which may occur due to oversized items or non-standard items being placed in the system, or baggage being placed in the system incorrectly. Tr. 36:6-13; 37:7-12. Bag jammer technicians are also responsible for overseeing the run-out belt, which is where baggage ends up that, for whatever reason, cannot be scanned by the BHS system. Tr. 27:4-9; 59:2-11. ABM employees are responsible for contacting the specific airline and delivering the item from the run-out belt to the airline according to its instructions. *Id.* For example, bag jammer technicians stationed at the South Oversize 2 position monitor the south side of the BHS and directly interact with Southwest, Alaska, and Spirit to get any misrouted bags to the proper airline bag well. Tr. 59:1-11; ER Exh. 2.

Bag jammer technicians are also responsible for monitoring the manual encode station. Tr. 46:1-16. The manual encode is a section of the system which provides an opportunity to rescan an item manually if the system has lost the item's tracking or the tracking information can no longer be read before the item is directed to the run-out belt. Tr. 46:4-16. Additionally, bag jammer technicians are responsible for collecting and distributing tubs to the member airlines. Tr. 63:21-24. For example, bag jammer technicians stationed at the North Matrix/North Tub position will use PAC-provided carts to transport tubs from the airlines' makeup units to the

designated tub station area and contact the bag jammer technician stationed at the airline ticket counters to come retrieve the tubs. Tr. 62:13-24.

Bag jammer technicians assigned to work the ticket counter work with the airlines to help place bags properly in tubs to prevent jams and to keep the airline system running to avoid delayed flights. Tr. 70:7-11. Bag jammer technicians stationed at the ticket counter will also look for oversize bags and any large groups checking bags and communicate with the airlines to prevent a backup or “gridlock” in the system. Tr. 70:12-18.

Bag jammer technicians are also responsible for retrieving baggage items from the oversize belt. Oversize or odd-sized baggage is hand-screened by TSA agents and then is placed on a separate belt within the system. Tr. 27:12-19. Once the baggage reaches the end of the belt, a bag jammer technician is responsible for using a PAC-provided vehicle to retrieve the oversize item and directly deliver it to the appropriate makeup unit or directly to the aircraft, per airline instruction. Tr. 27:19-23; 28:1-23. For example, bag jammer technicians stationed at South Oversize 1 are responsible for checking the south oversize belt and the Check Bag Resolution Area (“CBRA”). Tr. 61:12-17; ER Exh. 2. The CBRA is the location where TSA physically inspects checked baggage pursuant to FAA regulations. Tr. 61:16-17. After retrieving baggage from the CBRA, ABM Onsite employees deliver the baggage directly to the appropriate airline. Tr. 61:19-20.

Bag jammer technicians are also responsible for monitoring “stray bags.” For example, a bag jammer technician stationed at South Matrix will be tasked with checking the area of the system where explosive detection systems (“EDS”) are located. Tr. 62:1-5. This is the heart of the system and contains many “power turns” where a bag can fall off or get stuck and not trigger

a jam fault. Tr. 62:5-10. ABM Onsite employees are tasked with monitoring this area to correct any defaults or jams and ensure all bags are moving through the system. Tr. 62:9-10.

### **III. ABM ONSITE EMPLOYEES PERFORM WORK THAT IS TRADITIONALLY PERFORMED BY AIRLINE EMPLOYEES.**

Organizing under the RLA is done on the basis of well-established “crafts or classes” of employees. One such craft or class is “fleet service” workers, which consists primarily of baggage handlers – those whose job primarily consists of such functions as loading and unloading of baggage, delivering and picking up baggage from baggage areas, sorting baggage, operating ramp equipment and motorized ground equipment, and completing paperwork associated with the movement of baggage. *See Northwest Airlines*, 18 357, 359-60 (1991) (citing *In re Airline Industry Hearings*, 15 NMB 1 (1972)).

This is precisely the type of work that the ABM Onsite employees at PDX perform. They play an integral role in ensuring that passenger bags get from the ticket counter to the aircraft in a safe and timely manner. Tr. 49:19-22. They assist in sorting baggage by delivering the baggage tubs to the airlines (at the locations designated by the airlines) and in ensuring that the ticket counter agents are following proper baggage hygiene with respect to how the baggage is placed into the BHS. Tr. 70:7-18. If a bag falls off the BHS’s belts or gets jammed in the system, it is the responsibility of the ABM Onsite employees to locate the bag and to ensure it gets where it needs to go. Tr. 62:1-10. ABM Onsite employees locate bags that airlines have “lost” in the system and retrieve them for the airlines. Tr. 46:4-16. They pick up baggage from the oversize units and the run-out belts and deliver them to the airlines’ bag wells, where they are then placed on carts to be loaded on to the aircraft. Tr. 27:19-28:23. ABM Onsite employees even will deliver bags to the aircraft themselves when a bag is “late” and risks missing the flight. Tr. 49:19-22; Tr. 50:10-16. They operate motorized ground equipment, such as Taylor-Dunn

carts, which were specifically customized by PAC for ABM Onsite's use in delivering and picking up baggage. Tr: 28:1-23.

All of these functions fall within the scope of airline fleet service work. Indeed, the petition itself identified the employees as "Baggage Handlers." Bd. Exh. 1. Thus, the "function" test has been met. *See Boeing Airport Equipment*, 7 NMB 396 (1980) (company that had contract to install and maintain a BHS for the airline covered by the RLA; it's "baggage handling activities were furnished in support of United's air carrier activities and constitute a portion of the regular business of United at their other stations"); *Continental Airlines*, 10 NMB 433 (1983) (fleet service craft or class included "bag runner," whose functions were to transport baggage between the ramp and various facilities at the airport).

#### **IV. CARRIERS EXERCISES SIGNIFICANT CONTROL OVER ABM ONSITE'S OPERATIONS AND EMPLOYEES AT PDX.**

As is discussed further below, the airlines – through PAC – exercise an extraordinary amount of control over every aspect of ABM Onsite's operations at PDX: what the employees do, how they do it, when they work, where they are posted, how much they get paid, what they wear, etc.<sup>2</sup> Moreover, the relationship between ABM Onsite and PAC is not like the typical airline-contractor relationship, where a contractor offers the same type of services to a variety of different airline customers at an airport, and where the loss of a particular customer account is unlikely to significantly affect whether the company itself continues to do business at that facility. PAC is ABM Onsite's only customer at PDX – and the only customer it could have, given the nature of the work performed. Through its oversight of the BHS, the PAC is responsible for ensuring that the bags of every single airline at PDX get to their aircraft, and an

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<sup>2</sup> That the airlines have chosen to exercise their control over ABM Onsite by forming a consortium that is responsible for dealing with ABM Onsite on a daily basis does not affect the analysis of the control test. *See, e.g., Bradley Pac. Aviation*, 34 NMB 119 (2007) (service provider that managed fuel farm for consortium of airlines subject to RLA), *Aircraft Servs. Int'l Group*, 33 NMB 200 (2006) (same).

interruption to that process threatens the operation of numerous airlines simultaneously. Thus, PAC exercises comprehensive control over ABM Onsite's operations. In addition, because PAC is ABM Onsite's only customer, and due to the cost-plus nature of their contract, PAC has total control over ABM Onsite's expenses – including how ABM Onsite's employees are compensated. The “control” prong of the two-part test is satisfied here as well.

**A. Carrier Control Over Staffing Levels And Scheduling.**

The airlines exercises significant control over ABM Onsite's staffing levels and the schedules that the ABM Onsite employees work. The number of ABM Onsite employees at PDX, the hours they work, the posts where they are required to work, and their shifts are all dictated by the airlines' schedules and demands. Tr. 82:11-16; ER Exh. 1, Exh. A. Indeed, as set forth below, even the types of available positions are dictated by the airlines, through PAC.

The BHS initially began operations in 2010, with just the south side of the system operating at that time. Tr. 16:12-13. In 2011, the north side of system opened and thus the entire system was fully operational. Tr. 16:13-17. At that time, PAC authorized and approved the addition of a second supervisor to the ABM Onsite staff (there had only been one previously), so that the staff consisted of a Facilities Manager, two supervisors, bag jammer technicians, oversize technicians, and dispatchers. Tr. 16:18-17:2; 17:17-22. Under the structure at this time, the oversize technicians received a lower rate of pay than the bag jammer technicians did, and were not trained to handle jams in the system, meaning that the jammer technicians had to handle all of the jams that occurred throughout the five-mile BHS. Tr. 16:22-25; 85:13-86:11.

In approximately 2012, the airlines raised concerns about the number of bags cascading up to the ticket counter due to jams in the BHS not being addressed as promptly as the airlines wanted. Tr. 18:3-4. Because the BHS operates almost as a “freeway,” if there is a “gridlock” on

the system, the bags cannot move along the conveyor belt and thus bags will back up to the ticket counter. Tr. 19:19-20:6. As a result, bags will stop moving in the system and airlines are not able to check their passengers in. Tr. 20:8-20. Due to the airlines' concerns over the jams, ABM Onsite was instructed to restructure the job assignments of its employees so they could respond to jams in a more efficient manner and with an average response time of three minutes. Tr. 18:9-16. As a result of the airlines' instructions and discussions with Mr. Imlay, the oversize technicians and bag jammer technicians were cross-trained so they could each perform the other's job functions. Tr. 84:13-16; 86:16-25. As a result, employees were no longer separately categorized into oversize technicians and bag jammer technicians; all technician responsibilities were distributed between the employees. Tr. 85:13-20. Mr. Imlay approved the training and staffing schedule proposed by Ms. Wagoner. Tr. 84:20-25; 85:21-23. During this time, PAC also eliminated one of the ABM Onsite supervisor positions. Tr. 87:1-8.

PAC altered staffing levels again in approximately October 2014, when the former Facility Manager was terminated and Ms. Wagoner was promoted to interim Facility Manager, at Mr. Imlay's request. Tr. 88:4-7. Mr. Imlay decided to eliminate Ms. Wagoner's former supervisor position and promote four leads to supervisor positions. Tr. 89:11-13; 233:15-25. Throughout the lifetime of the contract, PAC has consistently exerted control over staffing decisions at PDX. In fact, ABM Onsite cannot increase staffing without PAC's prior approval. Tr. 84:4-7.

While the BHS typically operates between 3:30 a.m. and 11:00 p.m. each day, ABM Onsite employees' staffing schedule is entirely dependent on the airlines' schedule. Tr. 31:6-7. Thus, if there is a delayed flight, ABM Onsite employees are required to stay until the flight departs. Tr. 31:6-8. In the same vein, if an airline adds an earlier departure flight, ABM Onsite

employees must accommodate that change and arrange for employees to come in earlier. Tr. 31:6-13; 124:3-8; 127:22-24; ER Exhs. 10, 11. Ultimately, the number of hours ABM Onsite employees work is directly based on the airlines' needs. Tr. 38:23-39:10. ABM Onsite also is required to provide additional staffing during peak travel seasons, and to have "on call" staff available to be on-site within four hours if demanded by PAC for operational reasons. ER Exh. 1, Exh. A.

PAC directly controls the number of employees ABM Onsite may hire through its annual budget process. Tr. 82:11-22; 224:8-17. For example, during the 2015 budget discussions, ABM Onsite requested additional funding to provide holiday staffing relief. Tr. 224:20-25. Mr. Imlay rejected this proposal and, as a result, ABM Onsite will not be able to staff additional employees during the holidays. Tr. 225:1-7.

This type of carrier control over staffing and scheduling has been cited in numerous cases in which employers have been held subject to the RLA. *See e.g., Sky Cap*, 13 NMB 292, 293 (1986) (the employees' work "revolves around the right schedules of the airlines"); *Kannon*, 31 NMB at 417 ("Delta determines how many employees work each shift and at what locations"); *Signature Flight Support/Aircraft Service Int'l, Inc.*, 32 NMB 30, 39 (2004) (carrier's schedule dictated the staffing levels and hours); *Aircraft Services Int'l Group, Inc.*, 31 NMB 361, 367 (2004) (same); *AvEx Flight Support*, 30 NMB 355, 362 (2003) (carriers provided company with overall number of staff hours for each position based on its flight schedules); *Argenbright Security*, 29 NMB 340, 345 (2002) (carrier had to approve overtime); *ServiceMaster*, 24 NMB at 183 (carrier had to approve overtime in advance); *International Total Services*, 24 NMB 18, 22 (1996) (same). The fact that PAC wholly controls when, where, and with how many employees

ABM Onsite will perform its services is strong evidence of carrier control under the jurisdictional analysis.

**B. Carrier Control Over the Compensation of ABM Onsite Employees.**

Beyond setting and controlling ABM Onsite's employees' schedules, PAC also dictates employees' rate of pay and benefits – both by directly setting compensation levels in some cases, and through its control over ABM Onsite's employee wages and benefits by virtue of the parties' "cost plus" arrangement.

The PAC has explicitly established and/or approved compensation levels for ABM Onsite employees on several occasions, often in conjunction with its ability to control the type and number of ABM Onsite staff (e.g., authorizing raises for certain employees to be funded in large part by cost savings achieved by eliminating another position). For example, once the cross-training for former oversize technicians and bag jammer technicians was completed, as discussed above, Mr. Imlay approved increasing the rate of pay for the former oversize technicians to the bag jammer technician level after the cross-training was complete, which occurred at the same time that the number of ABM Onsite supervisors was reduced from two to one. Tr. 87:3-23. Similarly, when four former leads were promoted to newly-created supervisory positions in 2014, Mr. Imlay determined and set the annual salary for each supervisor, after deciding that Ms. Wagoner's former position would be eliminated as part of her elevation to Facility Manager. Tr. 88:20-89:10.

PAC has the authority, and in point of fact exercises such authority, to overrule and decline ABM Onsite's salary proposals. For example, when Ms. Wagoner was promoted to the position of Facility Manager, ABM Onsite initially intended to pay her the same annual salary as



the departing Facility Manager. Tr. 232:21-233:7. Mr. Imlay ultimately rejected ABM Onsite's proposal and set a different, lower salary rate for Ms. Wagoner. Tr. 233:8-9.

PAC makes the final compensation decision for all ABM Onsite employees. Tr. 88:1-3; 229:16-23. Indeed, ABM Onsite is not permitted to raise any employee's rate of pay without Mr. Imlay's prior approval. Tr. 236:5-8. ABM Onsite's monthly invoice to PAC includes a detailed accounting of what each employee makes and the benefits each employee receives. Tr. 97:13-16; ER Exh. 4. Mr. Imlay reviews and approves these figures each month, and may require additional explanation from ABM Onsite before approving a particular invoice. Tr. 97:17-18. For example, Mr. Imlay has questioned the computation of the ABM Onsite employees' health and welfare benefit expenses, resulting in invoice adjustments. Tr. 106:21-107:19. Additionally, ABM Onsite is required to receive approval from PAC for any and all overtime. Tr. 90:2-8; 217:12-19; ER Exh. 1, Exh. E (payment for overtime will be made only upon prior written consent of PAC General Manager). Moreover, ABM Onsite employees on the PAC contract receive a different holiday pay rate than ABM Onsite employees on any other project or contract. Tr. 148:17-24.

PAC control over ABM Onsite employees' compensation even extends to potentially paying those employees directly, and then deducting that pay from the amount PAC pays to ABM Onsite in a particular month. The contract states that if ABM Onsite underpays its employees, "PAC may withhold or cause to be withheld, out of payments due to the Contractor, an amount sufficient to pay the employees, the difference between the salaries required to be paid hereby and the salaries actually paid such employees for the total number of hours worked." ER Exh. 1, § 3.12.

This type of extensive carrier control over wages and rate of pay further demonstrates RLA jurisdiction. *See Boeing Airport Equipment, Inc.*, 7 NMB at 396-97 (finding RLA jurisdiction where employees' wages were subject to review and approval by United). Indeed, in many cases, control has been found despite a specific finding that the carriers did not set or control compensation. *See, e.g., New York Interstate Service, Inc.* 14 NMB 439, 441 (1987) (finding RLA jurisdiction even though employer "independently set[] the rates of pay and benefits its employees receive[d] [and] receive[d] monthly payments from [airline] which fluctuate[d] with the number of hours worked that month by [contractor] employees."); *John Menzies PLC d/b/a Ogden Ground Servs., Inc.*, 30 NMB 404, 408 (2003) (finding RLA jurisdiction even though employer determined the rates of pay and benefits for its employees).

**C. Carriers' Role In The Hiring, Termination, And Discipline of ABM Onsite Employees.**

Additional evidence of the significant control that the carriers exercises over ABM Onsite's PDX operations is in PAC's role in the hiring, promotion, termination, and assignment of ABM Onsite employees.

The airlines, through PAC, exercise substantial control over ABM Onsite's hiring at PDX. Although ABM Onsite is responsible for identifying and interviewing potential hires, it presents the candidates to Mr. Imlay for his consideration and approval before they are hired. Tr. 116:13-21; 165:21-25; Tr. 207:20-25. If Mr. Imlay has concerns or does not approve of a candidate, then that individual is not hired. Tr. 116:22-24. As Ms. Wagoner testified, Mr. Imlay approves all new hires on the contract. Tr. 80:16-17; 88:1-3 ("John Imlay makes the final decision of any compensation, any promotions, any discharge, John Imlay is in connection and making the final decision.").

Further evidence of the carriers' direct and substantial control over ABM Onsite hiring is found in the process by which Ms. Wagoner was promoted to Facility Manager. After the departure of the prior Facility Manager, ABM Onsite planned to post the position for open bidding and interviews. Tr. 232:9-11. Mr. Imlay instructed ABM Onsite not to post the opening for Facility Manager and further relayed that he wanted Ms. Wagoner to fill the position. Tr. 232:12-20.

Mr. Imlay also approves all ABM Onsite promotions. Tr.182:13-25. For example, ABM Onsite selected Thomas James Shannon for a promotion from bag jammer technician to dispatcher. Tr. 255:5-24. Before the promotion, the former Facility Manager, Shawn Williams, had to discuss the promotion with Mr. Imlay. Tr. 257:21-22. Mr. Imlay, however, only approved Mr. Shannon on a temporary or trial basis. Tr. 257:11-14. As a result, Mr. Shannon was only promoted to the dispatcher position on a temporary basis at first. Tr. 257:11-23.

Mr. Imlay even dictates which employees perform certain positions and what shifts employees may work. For example, Mr. Imlay was concerned that a dispatcher working the morning shift did not display proper problem solving techniques and lacked confidence in making "swift decisions." Tr. 118:10-12. Mr. Imlay instructed the Facility Manager at the time to move this employee to the night shift – which was less busy and hectic than the morning shift – until the person was "up to par." Tr. 118:12-15. Once Mr. Imlay felt that the employee had improved, he was moved back to the morning shift. Tr. 118:16-18.

The carriers, through PAC, also have the right to demand that ABM Onsite remove personnel from the BHS operations altogether – which necessarily would result in their dismissal from ABM Onsite. ER Exh. 1, Section 3.05 ("PAC reserves the right to direct the Contractor to remove any personnel from the performance of Services from any position upon material reason

therefore given in writing.”). Additionally, ABM Onsite does not have the authority to replace “Key Personnel” without the prior written consent of PAC. ER Exh. 1, Section 3.05.

Mr. Imlay has the authority to overrule or bypass any step in ABM Onsite’s disciplinary process, and approves all terminations from the contract. Tr. 149:1-5; 178:24-179:2.<sup>3</sup>

The carriers’ authority in this regard is not merely theoretical, and it has been exercised at PDX. In 2011, Ms. Wagoner (a supervisor at the time) was informed that there had been a physical altercation between an ABM Onsite employee and an employee of another airline contractor earlier that day, near the United Airlines’ ticket counter. Tr. 166:18-25. When Ms. Wagoner reported for her shift, Mr. Imlay directed her to meet with United’s manager about the incident. Tr. 170:4-7, 12-14. At the instruction of United and Mr. Imlay, Ms. Wagoner collected witness statements regarding the incident and verbally presented the information to Mr. Williams, the Facility Manager at the time. Tr. 167:11-15, 20-21; Tr. 174:1-2. Mr. Williams presented the information to Mr. Imlay and the United Airlines’ manager. Tr. 174:6-8. Ultimately as it was “the client’s request to have [the employee] removed, due to his fighting on duty”, the ABM Onsite employee was terminated. Bd. Exh. 2; *see also* Tr. 117:5-12.

In 2013, several ABM Onsite employees were involved in an incident on the BHS floor. Tr. 184:20-22. ABM Onsite conducted an investigation and recommended the termination of multiple individuals. Tr. 184:21-23. Mr. Imlay did not approve the terminations initially, and instead directed ABM Onsite to further investigate the situation. Tr. 185:1-3, 13-24. Indeed, Mr. Imlay specifically instructed ABM Onsite not to terminate the employees involved in the

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<sup>3</sup> The level of control exerted by PAC over ABM Onsite’s employees with respect to discipline and termination factually distinguishes this matter from *Menzies Aviation, Inc.*, 42 NMB 1 (2014). In that case, the NMB specifically relied on the fact that Alaska could not require Menzies to breach or depart from the disciplinary processes set out in its employee handbook in finding that Menzies employees were not subject to the RLA. *Id.* at 4.

incident until more information about the incident was obtained. Tr. 186:3-10. Ultimately, after further investigation, the employees were terminated with Mr. Imlay's approval. Tr. 185:22-24.

PAC also exerts control over the discipline of ABM Onsite employees short of termination. Tr. 114:18-25. For example, in January 2015 Mr. Imlay raised concerns to Ms. Wagoner regarding an employee's attendance. Tr. 115-1:3. In response to Mr. Imlay's request, Ms. Wagoner gathered information concerning the employee's recent attendance for Mr. Imlay. ER Exh. 7. Mr. Imlay ultimately instructed Ms. Wagoner to keep him apprised of the situation and instructed Ms. Wagoner that if the employee did not improve, ABM Onsite would need "to take action." Tr. 115-4-7.

The ability of a carrier to insist upon removal of personnel from its account – and the fact that the employer has disciplined employees based on carrier complaints – has long been held by the NMB to constitute strong evidence of carrier control. In *Bradley Pac. Aviation*, 34 NMB 119, 132 (2007), for example, the NMB found sufficient carrier control where one employee had been reassigned per a carrier's request and the employer had issued verbal and written warnings to its employees based on audit reports and complaints from the carriers. The NMB has reached the same conclusion in numerous other cases as well. *See, e.g., Air Serv*, 38 NMB at 121; *Swissport USA, Inc.*, 35 NMB 190, 196 (2008); *Air Serv*, 33 NMB at 286-87; *Aeroground, Inc.* 28 NMB 510, 517 (2001) (finding carrier control where employees had been "hired, counseled, suspended, transferred, removed, and terminated based on carrier requests."). PAC has exercised its right to direct removal and/or reassignment of ABM Onsite employees, and has demonstrated substantial involvement in ABM Onsite's hiring, promotion and discipline decisions. Thus, this factor too supports a finding of carrier control. *See Boeing Airport Equipment, Inc.*, 7 NMB at

396-97 (finding RLA jurisdiction where carrier had right to require the termination of contractor employees).

**D. Carrier Interaction With, And Direction Of, ABM Onsite Employees.**

Carriers' direction of the work performed by contractor's employees is another factor cited in prior decisions as supporting the finding of carrier control. *See, e.g., Signature Flight Support of Nevada*, 30 NMB 392, 397 (2003); *Aircraft Service Int'l Group, Inc.*, 31 NMB at 367-68. This factor is present here as well. PAC and carrier employees directly interact and direct ABM Onsite employees on a daily basis. Tr. 248:5-9; 252:18 (employee Michale McGuire testified he was "involved" with American Airlines "every day."). In point of fact, Mr. Inlay routinely checks in with dispatchers regarding operations. Tr. 49:12-16; 256:15-17.

For example, dispatchers communicate with airline carriers every day concerning missing bags. Tr. 48:4-11. ABM Onsite employees also directly communicate and receive instructions from airline employees if a bag is sent through the system without a proper checked bag tag. Tr. 47:22-48:2. Airlines also direct ABM Onsite employees to switch flights from one bag well to another. Tr. 137:10-11. As a result, ABM Onsite employees will have to change the route of operations, including the order and timing for retrieving bags from the oversize and run-out belts. Tr. 137:14-19.

ABM Onsite employees will directly drive vehicles out to the aircraft to get the bag to the appropriate airline for an on-time departure at the request of the airline. Tr. 49:19-22. Each airline has its own "cut off time" which sets forth the time that a passenger's baggage must be sent through the BHS in order to make the flight's departure time. Tr. 50:10-16. ABM Onsite employees are responsible for monitoring all airline departures to ensure that baggage is delivered to the flight for an on-time departure. *Id.*

Bag jammer technicians are also responsible for collecting and distributing tubs to the member airlines. Tr. 63:21-24. Each airline directs ABM Onsite employees where to place tubs at each ticket counter. Tr. 63:25-64:7; 64:25-65:20; 69:11. For example, Delta acquired a new mat at its ticket counter and directed ABM Onsite employees not to roll tubs behind their counter. Tr. 64:3-7. In 2014, Alaska Airlines directed ABM Onsite employees to place tubs in a separate and different location, directly overruling ABM Onsite's placement preference. Tr. 66:3-5; 68:4-17. Ultimately, ABM Onsite employees are informed to follow instructions from the airlines regarding tub placement at each ticket counter. ER. Exh. 12.

Carriers also direct and change ABM Onsite employees' job duties and responsibilities. Indeed, PAC set the station positions for all bag jammer technicians and approved the specific assignments for each station. Tr. 37:7-12; 54:21-23; 55:8-9; 56:4-7; ER Exh. 2. In December 2013, Southwest Airlines was concerned about the number of jams the system was experiencing which caused bags to cascade up to the ticket counter and resulted in a number of Southwest bags missing flights. Tr. 133:16-25. A Southwest supervisor came directly to the control room to instruct ABM Onsite employees to correct the issue. Tr. 134:5-17. Due to the airline's request, Ms. Wagoner was instructed to report to work the next morning at 4:00 a.m., even though that was not her scheduled arrival time, to help troubleshoot the problem. Tr. 135:16-22. Ultimately, per the airline's approval, ABM Onsite employees moved a portion of Southwest's flights to a different ticket counter to utilize a different, less busy part of the BHS and avoid a "traffic jam" of bags. Tr. 136:1-9; ER Exh. 13.

More recently, in 2014, Alaska Airlines complained that a large number of bags were missing flights. Tr. 128:16-18. Alaska Airlines purchased scanners for ABM Onsite employees to use and directed ABM Onsite employees to scan each oversize bag when it was retrieved from

the system. Tr. 129:2-9. This was not a task that ABM Onsite employees typically performed and, in point of fact, it did not perform this task for any other airline. Tr. 130:4-5. Once Alaska Airlines felt that there had been sufficient improvement, it directed ABM Onsite employees to stop scanning bags. Tr. 130:18.

**E. ABM Onsite Employees Are Held Out to the Public As Carrier Employees.**

Additional compelling evidence of carrier control is demonstrated by the uniforms ABM Onsite employees are required to wear. PAC dictates what ABM Onsite employees must wear on the job, and has decided that ABM Onsite employees must wear uniforms with the PAC insignia and logo (with the exception of “casual Friday,” discussed below). Tr. 111:4-6; ER Exh 1, Exh. A. The standard PAC uniform is a polo shirt with the PAC logo over the left breast pocket. Tr. 111:17-112:8. Thus, ABM Onsite employees are held out to the public as PAC employees. *See Swissport*, 35 NMB at 196 (finding employer was subject to RLA jurisdiction where, pursuant to the contract, employees were required to wear carrier uniforms and hold themselves out to the public as carrier employees); *Argenbright*, 29 NMB at 338 (finding sufficient carrier control where employees were required to wear carrier nametags and thus were held out to the public as carrier employees).

**F. Carriers Exert Control Over How ABM Onsite Employees Perform Their Jobs.**

**1. Carriers oversee and manage ABM Onsite employee training and qualifications.**

The carriers, through PAC, have established training requirements and qualifications that ABM Onsite employees must meet to perform services at PDX. This, too, demonstrates carrier control for purposes of the jurisdictional test.



Each ABM Onsite employee is subject to a three-week training course. Tr. 75:13-14. The first week focuses on familiarization with the system. Tr. 75:14-15. The second week is bag jammer training with a veteran jammer technician. Tr. 75:16-17. During the third week, the employee shadows a veteran employee and completes a training exam. Tr. 75:19-23. The training is based on the BHS Operations Manual, which was drafted by Mr. Imlay and PAC. Tr. 76:9-12. Mr. Imlay also has trained ABM Onsite employees on bag hygiene himself. Tr. 78:19-22. Furthermore, any additional training material is given to Mr. Imlay for his review and approval before it is distributed to ABM Onsite employees. Tr. 78:24-79:2.

The ability to control training requirements has been cited in numerous cases as a factor in finding carrier control. *See, e.g., Automobile Distribution of Buffalo*, 37 NMB at 379; *Argenbright*, 29 NMB at 347; *ServiceMaster Aviation Services*, 24 NMB at 186. Thus, this factor supports a finding of carrier control.

**2. Carriers set and control performance standards and reward ABM Onsite employees for their performance.**

PAC also controls how ABM Onsite employees perform their services through the establishment and enforcement of performance standards that PAC requires ABM Onsite to meet. PAC requires ABM Onsite to perform all services “according to those rules and regulations for services at the Airport, as applicable, and as promulgated by the Port of Portland, PAC, it’s General Manager, TSA, [and] FAA.” ER Exh. 1, § 3.03. Moreover, ABM Onsite is required to keep employee records of qualification and training onsite for PAC’s inspection. ER Exh 1; Exh. A. Indeed, all ABM Onsite records pertaining to reimbursable costs are subject to audit by PAC. ER Exh. 1, Exh. E-1.

PAC monitors ABM Onsite employees’ productivity and performance. For example, ABM Onsite compiles statistics throughout each day, by employee, regarding the number of

jams and fail-safes the system encounters, the number of bags that went to the run-out belt, the number of bags that went to the encode station, how many bags missed a flight for an airline, and if anything in the system was lost. Tr. 44:20-45:19; ER Exh. 1, Exh. A (“Contractor shall provide PAC with baggage statistics by airline as requested.”); ER Exh. 8; ER Exh. 9. ABM Onsite submits these reports to Mr. Imlay for his review. *Id.* Per the contract, ABM Onsite employees are to ensure a 3-minute response time to any jams with an overall goal of 99% system availability. Tr. 18:9-11; ER Exh. 1, Exh. A.

PAC dictates and controls what rewards or bonus incentives ABM Onsite employees receive. For example, Mr. Imlay must approve and authorize lunch to be brought in for employees as a reward for good performance. Tr. 108-17:24. Mr. Imlay also approved and set the bonus amount for the employee of the month program. Tr. 109:3-11. In December 2014, Ms. Wagoner approached Mr. Imlay about giving employees a holiday bonus in recognition of their hard work during the busy holiday season. Tr. 97:23-98:7. Ms. Wagoner not only needed Mr. Imlay’s approval to provide employee’s with a holiday gift card, but also needed Mr. Imlay to approve the actual dollar amount for each gift card. Tr. 98:1-7. In point of fact, Mr. Imlay rejected Ms. Wagoner’s initial proposed monetary amount and the two engaged in a back and forth dialogue before Mr. Imlay ultimately approved the request. Tr. 98:8-99:11; ER Exhs. 5, 6.

The establishment and enforcement of performance standards of this sort have been cited in other cases as indicia of carrier control as well. *See, e.g., Quality Aircraft Services*, 24 NMB at 288 (carrier employees discussed performance of contractor’s employees with contractor’s supervisors on a daily basis); *ServiceMaster*, 24 NMB at 184 (carrier required contractor to meet specific performance standards). Thus, this factor supports a finding of RLA jurisdiction.

### **3. Carriers provide all equipment and physical space used by ABM.**

PAC also controls how ABM Onsite employees perform their services by providing the equipment that they use in performing their duties and by providing ABM Onsite with physical space at the airport. ABM Onsite employees use personal protective equipment (“PPE”), hard hats, gloves, locks, Taylor-Dunn carts, bikes, stand-up carts, and tubs in the performance of their duties. Tr. 41:10-42:11; 109:20-110:10. Indeed, PAC owns the vehicles ABM Onsite employees use to transport baggage items and, in point of fact, had the vehicles customized for ABM Onsite’s use. Tr. 28:1-3, 16-23. PAC owns all of this equipment and provides it to ABM Onsite employees. Tr. 110:12-13, 22-23.

PAC also provides ABM Onsite office space at PDX and pays for ABM Onsite’s utilities. Tr. 109:16-19. In fact, Ms. Wagoner’s office is a mere “five steps” away from Mr. Imlay’s office. Tr. 30:12-16. PAC also pays for ABM Onsite employees’ parking, ABM Onsite’s internet access, and the fees associated with the security badging process for each ABM Onsite employee at PDX. Tr. 92:7-8; 92:15-17; 107:22-108:6.

Further, under the cost-plus contract, all expenses are billed back to PAC. ER Exh. 4; Tr. 90:18-91:1. ABM Onsite submits monthly bills to Mr. Imlay for his review. Tr. 90:9-16. During Mr. Imlay’s review of the monthly invoice, he will question or push back on specific line items. Tr. 97:19-20; 106:13-18. For example, Mr. Imlay has requested corrections to the health and welfare line item billed to PAC. Tr. 106:21-25.

The fact that carriers provided equipment and/or physical space to a service provider has been cited in numerous cases as indicia of carrier control for purposes of the jurisdictional analysis. *See, e.g., Air Serv*, 35 NMB 201, 211 (2008) (carrier provided Air Serv with office

space, telephone, electricity and cleaning services); *AvEx Flight Support*, 30 NMB at 362 (carrier provided free office space of supervisors).

#### **4. Carriers exert control over uniform and grooming standards.**

As noted above, ABM Onsite employees are required to wear uniforms with the PAC insignia and logo and are held out to the public as PAC employees. *See supra* Section IV.E. PAC also exerts significant control over the uniform and grooming standards of ABM Onsite employees. Recently, ABM Onsite employees requested to have a “causal Friday.” Tr. 112:16-17. Mr. Imlay took the request to the PAC committee and PAC approved employees wearing jeans on Friday and an ABM Onsite t-shirt. Tr. 112:18-23. After this change in policy, ABM Onsite employees requested to have a “causal Monday” for those employees that did not work on Friday, but Mr. Imlay rejected that request. Tr. 113:7-13. ABM Onsite also had to seek approval of Mr. Imlay for employees to wear sweat shirts or jackets. Tr. 113:23-114:12.

The right of carriers to dictate uniform and grooming standards has been cited in several cases as indicative of carrier control, even when the employees do not wear carrier uniforms or insignia. *See, e.g., Automobile Distribution of Buffalo*, 37 NMB at 379 (carrier approved uniform requirements and required that uniforms be clean and free from exposed objects); *North American Aviation Services, PHL, Inc.*, 28 NMB 155, 159 (2000) (employees had to be in uniforms that were acceptable to the carrier and has to meet the carrier’s grooming standards); *Command Security Corp.*, 27 NMB at 585 (contracts gave carriers right to approve uniforms and set general standards of appearance).

#### **V. CONCLUSION**

Based on the evidence of the record and the controlling legal precedent applicable thereto, Respondent respectfully requests that the Regional Director dismiss the petition for lack

of jurisdiction or, in the alternative, refer the matter to the Board in Washington, D.C. so that the Board may seek an advisory opinion from the National Mediation Board (“NMB”) on the jurisdictional issue.

Submitted this 5th day of February, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 5th day of February, 2015, a copy of the foregoing  
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